appellant, by his counsel, has so agreed, it only remains for me to allow this appeal, set aside the order of the learned President, and order that the respondent do deliver up vacant possession of the two rooms in question on or before the 30th September, 1962, and that the respondent do further pay to the appellant double rent with effect from 1st November, 1960 pursuant to the provisions of subsection (4) of section 28 of the Civil Law Ordinance, 1956 until possession is given up by him. As to costs, the appellant will have the costs of this appeal and in the Court below.

Appeal allowed.

Solicitors: *P. G. Lim; Balwant Singh & Co.*

BEECHAM (MALAYA) LTD. v. YUNUS

[C.A. (Thomson C.J., Syed Sheh Barakbah and Azmi JJ.) May 6, 1962]

[K.B. — F.M. Civil Appeal No. 48 of 1961]

Master and Servant — Vicarious liability — Servant who was the driver allowing a third person to drive — Lorry meeting with accident — Negligence of 3rd person who was driving — Whether master vicariously liable.

Practice and Procedure — Whether Court should consider question of negligence that was not included in grounds of appeal.

Evidence — Calling of, by judge, where parties had not — Judge has no power to dictate.

The appellant's lorry collided with the respondent's lorry which was driven by one X. This X was not the driver of the respondent but he drove the lorry with the knowledge of the respondent's driver who was sitting by his side. It was contended for the respondent that: (1) there was no vicarious liability on his part because he had no knowledge of the fact that the said X was driving the lorry, (2) negligence which was denied by the respondent was not proved by the appellant.

Held: (1) there was ample evidence to show that the driver was the servant of the respondent and that the lorry was driven for the purpose of the respondent's business and although he (respondent) was not present when the lorry was being driven by the said X the driver was there by his side. In the circumstances the respondent was vicariously liable for the negligent act of the said X. *Rickets* v. *Thos. Tilling Ltd.* (1) and *Marsh* v. *Moores* (2) followed;

(2) the court should not consider the question of negligence at this stage when it was not included in the grounds of appeal. Following *London, Chatham & Dover Railway Co.* v. *South-Eastern Railway Co.* (3) and *Wilson & Anor.* v. *United Counties Bank Ltd.* (4).

Per **Thomson C.J.**: ". . . . . in my view in making an order for a retrial, which in effect required the calling of evidence which the parties themselves had not called, the trial Judge was going to some extent beyond his powers. . . . . In my opinion it is thus clear that a Judge has no power to dictate to the parties what witnesses they shall call:"

Cases referred to:—

(1) *Rickets* v. *Thos. Tilling Ltd.* [1915] 1 K.B. 644.
(2) *Marsh* v. *Moores* [1949] 2 K.B. 208 at p. 217.
(3) *London, Chatham & Dover Railway Co.* v. *South-Eastern Railway Co.* (1889) 40 Ch. D. 100.
(4) *Wilson & Anor.* v. *United Counties Bank Ltd.* [1920] A.C. 102, 106.
(5) *In re Enoch & Zaretzky, Bock & Co.'s Arbitration* [1910] 1 K.B. 327.
(6) *Coulson* v. *Disborough* [1894] 2 Q.B. 316.

COURT OF APPEAL.

H. L. Wrigglesworth for the appellants.

N. Sharma for the respondent.

Syed Sheh Barakbah J. (delivering oral judgment): This is an appeal against the judgment of the High Court in allowing the appeal against the judgment of the learned Magistrate.

The brief facts are that there was a collision between the lorry belonging to the plaintiff and that of defendant No. 1 which was driven by defendant No. 2 who was not the driver of defendant No. 1 but defendant No. 2 drove the lorry with the knowledge of the 1st defendant's driver who was sitting by his side.

The point raised by Mr. Sharma, counsel for the respondent (defendant No. 1), was that there was no vicarious liability on the part of defendant No. 1 who had no knowledge of the fact that defendant No. 2 was driving the lorry. On this point there was ample evidence to show that the driver was the servant of respondent and that the lorry was driven for the purpose of respondent's business and although he was not present when the lorry was being driven by defendant No. 2, the driver was there by his side. In the circumstances the respondent was vicariously liable for the negligent act of defendant No. 2. I need only quote two authorities on this point. There was the case of *Rickets* v. *Thos. Tilling Ltd.* (1) and there was also the judgment of Lord Goddard in *Marsh* v. *Moores* (2).

The next point raised by the said learned counsel was that negligence which was denied by the defendants was not proved by the appellant. Negligence was alleged in the pleadings but it was not proved at the hearing. According to the notes of evidence at page 9 at the beginning just two lines below paragraph D it is stated —

"Negligence is being admitted by 2nd defendant"

and after that nothing was mentioned about negligence in the evidence. Under cross-examination at page 11 of the record defendant No. 1 stated —

"I agree that the lorry of mine was to go to Kuala Krai to take goods. My complaint solely is that Hamid was my driver and why should defendant No. 2 was driving. I admit Hamid bin Salleh has full control of the lorry and no one else. I agree Hamid is my servant. I gave the lorry T.3604 under the sole care and charge of Hamid bin Salleh."

And in the grounds of appeal to the High Court respondent merely relied on the fact that the defendant No. 2 was not his servant.

Now, should this Court consider the question of negligence at this stage when it is not included in the grounds of appeal. I can do no better than quote the case of *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (3). At the bottom of the head note it is stated —

"And in a case where the defendant had in his pleadings insisted on his right to arbitration, but had failed to raise the point at the hearing and had gone into evidence on the merits, the Court of Appeal refused to allow the point to be raised on the appeal."

And on page 105, Cotton L.J. states —

"In my opinion the parties ought not to be allowed to do that. If when they can insist on the Court not going into the merits of the case and deciding questions between the parties, they abstain from doing so, and are defeated on the merits, in my opinion it is too late to insist before the Court of Appeal on any right to object to the jurisdiction of the Court which they might have had if they had insisted on it in a proper way and at a proper time."

And Lord Birkenhead in the case of *Wilson & Anor.* v. *United Counties Bank, Ltd.*[4] —

"In the second place I think it necessary to point out that, unless the circumstances are wholly exceptional, appellants must be strictly held to the grounds of appeal which they think proper to set forth in the formal documents which are demanded from them. The object of indicating in detail the grounds of appeal, both to the Court of Appeal and to your Lordships' House, is that the respondent parties may be accurately and precisely informed of the case which they have to meet. Their efforts are naturally directed to the contentions which are put forward by the appellants. They are entitled to treat as abandoned contentions which are not set forth."

In my opinion, speaking for myself, the points raised by Mr. Sharma must fail. In the circumstances I allow the appeal with costs here and in the Courts below.

Thomson C.J. (delivering oral judgment): I agree with everything my Lord has said. I agree that if the respondent's vehicle was being negligently driven then in the circumstances which my Lord has described the defendant was vicariously liable. The authority for that is to be found in the case of *Rickets* v. *Thos. Tilling Ltd.* [1] and *Marsh* v. *Moores* [2]. I agree that it was fully admitted by the defendant that there was negligent driving. The whole case after the pleadings was conducted on the basis that the only issue was that of vicarious liability.

I would only add that in my view in making an order for a retrial, which in effect required the calling of evidence which the parties themselves had not called, the trial Judge was going to some extent beyond his powers.

In that connection I would mention the case of *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* [5]. That case is to be considered in the light of the earlier case of *Coulson* v. *Disborough* [6]. That case was decided in 1894 and in it the Court of Appeal had made some rather wide statements regarding a Judge's power to call evidence. In *In re Enoch's case* which was tried in 1909 Fletcher Moulton L.J. said (at p. 332):—

"……there is an idea that an umpire, a person in a judicial position, has the power, and, I suppose, the duty, to call witnesses in a civil dispute, whom the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case."

His Lordship went on to discuss the case of *Coulson* v. *Disborough, supra,* and said (at p. 333):—

"There may in some cases be a person whom it would be desirable to have before the Court; but neither party wishes to take the responsibility of vouching his personal credibility, or admitting that he is fit to be called as a witness. In such a case the judge may relieve the parties by letting him go into the box as a witness of neither party; and, of course, if the answers are immaterial he may refuse to allow cross-examination. But the dictum does not lay down, and in my opinion it is certainly not the law, that a judge, or any person in a judicial position, such as an arbitrator, has any power himself to call witnesses to fact against the will of either of the parties."

In my opinion it is thus clear that a Judge has no power to dictate to the parties what witnesses they shall call.

I agree with my Lord that the appeal should be allowed.

Azmi J. concurred.

Appeal allowed.

Solicitors: *H. L. Wrigglesworth; N. Sharma.*

LOOI WOOI SAIK v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) June 11, 1962]

[Penang — F.M. Criminal Appeal No. 12 of 1962]

Criminal Law and Procedure — Murder — Defence of provocation — Special exceptions — Burden of proof.

Evidence Ordinance, 1950, ss.3, 101, 102 and 105 — Direction to the jury — Penal Code, ss.302 and 304.

The appellant was convicted for the murder of a woman in contravention of section 302 of the Penal Code and was sentenced to death. At the trial the only question in issue was whether by reason of provocation the killing amounted to something less than murder and the only question before the Court of Appeal was the correctness of the trial Judge's direction on the question of provocation. The learned trial Judge had directed the jury as follows:

"Now, the defence in this case as put up by counsel is that the accused killed the woman whilst he was deprived of his power of self-control by reason of a sudden and grave provocation, and the question whether there was such provocation is a question of fact for you to consider. I think I had better say it now that when you are considering the defence story you do so only on the balance of probabilities, that is to say, if you think that the defence story is reasonably true, then you must say that he has discharged that burden. The burden is certainly on him on this question of provocation. Now, if the accused has succeeded in satisfying you on the balance of probabilities that there was provocation then, gentlemen, the offence he committed would not have been murder but culpable homicide, or man-slaughter as they call it in England. Now, the defence must satisfy you that the provocation was both grave and sudden and its gravity and suddenness not only deprived the accused of his power of self-control but would also deprive a reasonable man of his power of self-control."

Held: the learned trial Judge's direction to the jury was not correct; the proper direction to the jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defence which is capable of making it out. But if there is anything to support it, then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of provocation. In this case it was quite impossible to say what view the jury would have taken had they been directed in proper terms. The conviction for murder must therefore be set aside and a conviction for culpable homicide not amounting to murder substituted for it.

Observations on the burden of proof and the general exceptions provided in the Penal Code.

Cases referred to:—

(1) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462.